IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-1278

CHARLES ADAMS, LARRY WASHINGTON, GEORGE W. ANDREWS, BILLY LOVETT, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioners,*

v.

FEDERAL EXPRESS CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Charles Adams, Larry Washington, George Andrews and Billy Lovett, pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision and order of the United States District Court for the Western District of Tennessee is unofficially reported at 90 L.R.R.M. 2742; it is reprinted in App. A, pp. 1a-5a *infra*. The opinion of the Sixth Circuit Court of Appeals is unofficially reported at 94 L.R.R.M. 2008; it is reprinted in App. B. pp. a-*infra*. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331, 1337 and 45 U.S.C. § 151 *et seq.*, while the Sixth Circuit's jurisdiction was based on 28 U.S.C. §§ 1291, 1292(a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 16, 1976. It is reprinted in App. C, p. 18a *infra*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a labor organization engaged in an active attempt to organize the employees of an air carrier for purposes of collective bargaining under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, have standing to seek injunctive relief against the employer's interference with employee organizational rights protected by Section 2, Third and Fourth of the Act, where:

> (a) Such relief is sought by the organization on its own behalf to prevent the employer's destruction of the organizational campaign and to insure employee freedom of choice; and
>
> (b) the organization is seeking relief against violation of the statutory rights of employees who have authorized it to represent them in their employment conditions under the Act?

2. What standards must be met in order to obtain preliminary injunctive relief against pre-election carrier interference with the organizational rights of employees?

STATUTES INVOLVED

This case involves Section 2, Third and Fourth of the Railway Labor Act, 45 U.S.C. § 152, Third and Fourth. These provisions are reprinted in App. D., pp. 19a-20a *infra*.

STATEMENT OF THE CASE

1. The Factual Background

Respondent Federal Express Corp. (Carrier) is a charter air freight carrier, having its principal office at the Memphis, Tennessee Airport, where its administrative, aircraft maintenance and package sorting facilities are maintained. The Carrier specializes in providing an expedited, small-parcel cargo service between Memphis and major market areas located in some seventy cities throughout the United States. It uses a fleet of Falcon jet aircraft for intercity, interstate shipments. Pickup and delivery service within market areas is provided by a fleet of vans.[1]

Petitioner International Brotherhood of Teamsters (Union) is a labor organization, whose Airline Division attempted to organize, among others, the Carrier's mechanics and fleet service employees. Petitioners Adams, Andrews and Washington are union adherents

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[1] The Respondent is the Nation's largest air-taxi carrier of freight and the second largest carrier of mail. *Commuter Air Carrier Traffic Statistics—1975*, CAB, May, 1976, at 3. The reference "JA" used in the following paragraphs refers to the Joint Appendix in Case No. 75-2340, which Petitioners have requested the Sixth Circuit to certify to this Court. Rule 21(1).

whom the Carrier discharged during the organization campaign. Petitioner Lovett, an employee leader and union supporter, was involuntarily reassigned during the organization campaign and, following a short military leave of absence, was initially denied reemployment. (JA 82-83, 348, 328-30) He was finally rehired pursuant to the Military Selective Service Act, 50 U.S.C.A. §§ 451, 459(b).

The present dispute arose out of a campaign begun by the Union in February, 1975, to organize the Carrier's unrepresented employees. The campaign focused on the mechanics and fleet service personnel working in the package sorting facility at Memphis. At the outset of the campaign, even after Petitioner Washington's discharge, employee interest in organization was high. Most of the authorization cards which, on April 14, 1975, enabled the Union to petition the National Mediation Board for elections in the mechanic and fleet service crafts were obtained in February and early March, 1975. (JA 193) Card signers authorized the Union to represent them "in all negotiations of wages, hours and working conditions in accordance with the Railway Labor Act." (JA 420) Over 35 percent of employees in each craft signed cards. 29 C.F.R. § 1206. 2(b).

On March 10, 1975, the Carrier instructed union supporters to remove their "Go Teamster" buttons (JA 148-49), and informed Petitioner Lovett that he was being reassigned from his job as a lead mechanic to a salaried position in the Training Department. (JA 76-77) At an employee meeting on March 11, 1975, the Carrier's Vice President said that Lovett was being moved because of his union activities and would be fired if he did not accept the training position. (JA

79, 117) Petitioner Adams, a janitor, was discharged on March 12, 1975, for not obeying a Vice President's order to remove his "Go Teamster" button. (JA 61-63, 350-51) Petitioner Andrews was discharged on April 10, 1975, the day after service in this action was effected on the Carrier, purportedly for absenteeism.[2]

In addition to the conduct affecting the individual plaintiffs, various other incidents of alleged Carrier interference were litigated at the six-day preliminary injunction hearing. These included surveillance of, and interrogation concerning, employee union activities,[3] threats to close if the Union succeeded,[4] threats of retaliation against supporters[5] and promises of benefit.[6] Some of these incidents were contested by the Carrier's proof and some were not. In any event, from mid-March, 1975, the Union's campaign lost ground, as employees expressed their reluctance to talk with organizers, stopped attending union meetings and declined to sign authorization cards. (JA 190-95)

2. Proceedings Below

A. Proceedings In The District Court

Petitioners brought this action against the Carrier, alleging that it had interfered with, coerced and restrained its employees in the exercise of their organizational rights in violation of Section 2, Third and Fourth of the Railway Labor Act, 45 U.S.C. § 152. A

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[2] JA 149-53, 194-95, 259-70, 330-35, 227, 358-59, 401, 408-18.

[3] JA 69, 76, 99-104, 120, 140-46, 171, 363-65, 406.

[4] JA 104, 121-22, 395-400.

[5] JA 99-102, 104, 106-11, 227-30, 296-97, 363-64, 393-95.

[6] JA 103, 121-22, 146-48, 201-04, 287-88.

temporary restraining order against further discharges was denied. After a six-day hearing, the District Court dismissed the Union's complaint and denied the individual plaintiffs' motion for preliminary injunctive relief. In the District Court's view, the Union lacked standing to bring the suit, while the individual plaintiffs had shown "only a good possibility" of success on the merits and had not shown irreparable injury. A final judgment dismissing the Union's complaint was later entered in compliance with Rule 54 (b), Federal Rules of Civil Procedure. (App. A, p. 8a)

The District Court concluded that the Union lacked standing to bring suit against carrier interference because it had not been certified by the National Mediation Board as the representative of craft or class employees under Section 2, Ninth of the Act. 45 U.S.C. § 152, Ninth. It apparently considered immaterial whether the Union had a personal stake in the controversy, or whether it had a nexus with the Carrier's employees, because the case involved neither civil rights nor environmental issues, and "there are available plaintiffs here with a direct personal and financial interest in the outcome of this litigation." (App A, p. 3a) The District Court also read *IBT* v. *Zantop Air Transport Corp.*, 394 F.2d 36 (C.A. 6), a Section 2, Fourth case where the plaintiff union's appeal was dismissed as moot after a rival union had been certified by the NMB, as indicating the Sixth Circuit's implied agreement with the lower Court's holding that the plaintiff union lacked standing to challenge carrier interference during the organizational campaign. (App. A, p. 2a)

The individual plaintiffs were held to have standing; however, the District Court found that they failed to make the requisite showing for preliminary relief. "[T]here is only a good possibility that the plaintiffs will succeed on the merits." Also, the Court found that they had not shown irreparable injury; that a balance of harm favored the Carrier; and that the public interest would not be served by injunctive relief. It reasoned that the Carrier had not "engaged in a conscious concerted attempt" to violate the Act and had no "practice" of discharging union adherents. The Carrier did not favor the Union, the Court said, but the communication of its disfavor to employees did not warrant the extraordinary relief requested. (App. A, pp. 4a-5a)

B. Proceedings In the Court of Appeals

An appeal was taken from the District Court's final judgment of dismissal and its order denying preliminary injunctive relief. The plaintiffs' motion for an injunction pending appeal was denied by both the District Court and the Court of Appeals. On December 16, 1976, the panel of the Sixth Circuit which heard the appeal issued its opinion and judgment affirming the District Court. Since the Carrier had questioned the District Court's subject-matter jurisdiction, the panel first addressed this issue. Stating that it "would prefer to hold that the District Court has no jurisdiction," the panel nevertheless concluded, on the basis of "compelling judicial precedent," that the District Court's subject-matter jurisdiction had been properly invoked. "Unfortunately, Congress has not . . . provided [for exclusive NMB jurisdiction] with respect to those parts of the Railway Labor Act here involved

. . . ." (App. B, p. 11a) It held, however, that the District Court did not abuse its discretion in denying the individual plaintiffs preliminary relief.

In affirming the dismissal of the Union's complaint, the Sixth Circuit panel "read *Zantop* to stand implicitly for the proposition that the Railway Labor Act confers no express or implied cause of action in favor of an uncertified union." (App. B, p. 12a) In *Zantop,* the plaintiff union sought, *inter alia,* reinstatement and back pay for a discharged employee, and the Sixth Circuit held that the matter could not be considered because it involved the private statutory rights of the dischargee who was not a party to the action. Although the Court in *Zantop* did not link this aspect of its holding to the plaintiff union's uncertified status, the panel in this case viewed *Zantop* as holding "that an uncertified labor organization could not enforce such [Section 2, Third and Fourth] rights for the employees it sought to represent . . . ." (App. B, p. 11a) No distinction was drawn in this case between the Union's standing to seek general injunctive relief and its standing to pursue the individualized claims of the four employee Petitioners.

The Sixth Circuit panel stated that it was applying the criteria set forth in this Court's opinion in *Cort* v. *Ash*, 422 U.S. 66, "on the issue of whether a statute confers an implied right of action." (App. B, p. 12a)

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . .? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . . [*Id.* at 78. (Citations omitted.)]

While it is unknown how these criteria were actually applied to the facts of this case, the panel concluded that their application showed "that the Railway Labor Act confers no implied right of action upon an uncertified union . . . ." (App. B, p. 13a)[7]

REASONS FOR GRANTING THE WRIT

I.

The Court Below Has Decided An Important Federal Question Erroneously And In Conflict With This Court's Decisions And Well-Established "Standing" Principles

In holding that a union lacks standing to challenge carrier interference with organizational rights until it has been certified by the National Mediation Board, the Court below misapplied or ignored this Court's decisions under the Railway Labor Act, 45 U.S.C. § 152, Third & Fourth, as well as the "standing" principles announced by this Court and other Courts of Appeal. The lower Court's decision is at odds with this Court's recognition that "a primary purpose of the major revisions made in 1934 [Section 2, Fourth] was to strengthen the position of the labor organizations vis-a-vis the carriers." *IAM* v. *Street,* 367 U.S. 740, 759. This statement not only reflects industrial reality; it accords, as the decision below does not, with earlier decisions of this Court holding that a private right of action is available under the Act.

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[7] The Sixth Circuit panel took judicial notice of the fact that on January 13, 1976, the National Mediation Board certified the results of the election in the mechanic craft or class, indicating that 11 of 104 eligible employees voted for the Union. (App. B, p. 12a) The Union's petition involving the Carrier's fleet service personnel remains pending before the Board on the Carrier's question regarding the scope of the craft or class.

In *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks,* 281 U.S. 548, the Brotherhood obtained an injunction under Section 2, Third against the railroad's continued recognition of a company-dominated association of its clerical employees, even though the railroad claimed that its recognition was based on its employees' demonstrated preference for the association. The Brotherhood had been recognized by the railroad as a result of a decision by the Railroad Labor Board (24 F.2d at 432, n. 16), created by the Transportation Act of 1920, 41 Stat. 456, 469, but the Board's decisions had no legal force beyond moral suasion. After the RLA was passed in 1926, the Brotherhood referred a contract dispute to the Board of Mediation. The railroad sharply contested the Brotherhood's right to represent its employees, and engaged in conduct coercive of its employees' right to select their own representative, including recognition of the association.

The District Court granted an injunction against the railroad's coercive conduct; upon noncompliance, a contempt citation issued. The Court of Appeals affirmed. (33 F.2d 13) This Court held unequivocally, in affirming the appellate court, that Section 2, Third's "prohibition of interference . . . in connection with the choice of representatives" is "susceptible of enforcement." 281 U.S. at 569. Of particular pertinence was its subsidiary holding that the "interest, with respect to the selection of representatives to confer with the employer in relation to contracts of service . . ." was "a property interest in the employees" sufficient to satisfy the Clayton Act's requirement for irreparable injury "to a property right, of the party

making the application," as a condition of injunctive relief. 29 U.S.C. § 52; 281 U.S. at 571.

On the facts present here, the decision of the Sixth Circuit that an uncertified union may not sue for general relief against carrier interference cannot be reconciled with *Texas & N.O.* There the Brotherhood, as to which recognition had been withdrawn, was no more "certified" than this Union Petitioner. In each case the carrier involved prevented its employees from selecting a union as their representative by unlawful interference. While the issue in *Texas & N.O.* was not expressly phrased in terms of standing, this Court's holding that the employees, as embodied by the Brotherhood in its application for injunctive relief, had suffered irreparable injury to a property interest is dispositive of the Carrier's contention that standing was lacking here. That this case was brought under Section 2, Fourth, as well as Third, does not diminish the conflict. For Section 2, Fourth simply "continued and made more explicit" the Act's prohibition against carrier interference. *Virginian Ry.* v. *System Federation No. 40,* 300 U.S. 515, 543.

Moreover, the Court below found no evidence of a legislative intent to *deny* standing to unions engaged in organizational attempts. Since Congress clearly intended Section 2, Third and Fourth, to be enforceable by private suit, and there is no indication that uncertified unions were to be excluded from the enforcement scheme, the question of who may bring suit depends on well-established principles of standing. Yet the Courts below ignored both of the Union's claims of standing: (1) that the Union had suffered actual injury by the carrier's illegal action which

threatened to, and eventually did, destroy its organizational campaign, and thereby prevented it from becoming the certified representative of the mechanic craft or class; and (2) that the Union could represent employee supporters[8] who themselves had suffered immediate or threatened injury as a result of the carrier's conduct.[9] This action by the lower Court creates a sharp conflict in principle between its holding and decisions of this Court which warrants review.

In *Allee* v. *Medrano*, 416 U.S. 802, 819 n.13, this Court held that a union, whose campaign to organize farm workers was crushed by unlawful interference which placed workers in fear of lending their support, had standing in its own right to bring suit under 42 U.S.C. § 1983. A union can act only through its supporters in an organizational campaign. Their activities are indistinguishable from its own, and it is such organizational activities that Federal law is designed to protect. These principles were ignored by the Court of Appeals' denial of the Union's right to vindicate its own injury. Also, the Court rejected

[8] Over 35 percent of employees in each craft signed authorizations enabling the Union, *inter alia*, to represent them in their wages, hours and employment conditions under the Act. 29 C.F.R. § 1206.2(b).

[9] The District Court stated erroneously: "According to the union's logic any number of unions that desire to represent defendant's employees could seek to be parties in this litigation or bring suit on their own." (App. A, p. 3a) Thus the Court did not recognize that only unions engaged in active organizational efforts, like the Petitioner here, would suffer direct injury and/or have an actual nexus with employees, and thereby satisfy the requirements for standing established by this Court. Moreover, the fact that other, or even many, persons share the same injury is an insufficient reason for denying standing. *United States* v. *SCRAP*, 412 U.S. 669, 686.

the principles of standing recently announced in *Warth* v. *Seldin*, 422 U.S. 490. There this Court indicated that, "even in the absence of injury to itself, an association may have standing solely as the representative of its members" to assert claims "that would make out a justiciable case had the members themselves brought suit." *Id.* at 511; *National Motor Freight Ass'n* v. *United States*, 372 U.S. 246.[10]

II.

The Court Below Has Decided Important Questions Of Federal Law In Derogation Of The National Labor Policy

Without timely, pre-election judicial relief preserving the right of employees to freely select a representative, there is little to prevent carriers from engaging in coercive conduct "swift and forceful enough to prevent organization of a union altogether." *Burke* v. *Compania Mexicana DeAviacion, S.A.*, 433 F.2d 1031, 1033 (C.A. 9). The lower Court's decision effectively eliminates this protection by requiring unions to prevail in the face of unremedied carrier interference and become certified as the majority representative of craft employees before seeking a judicial remedy. This result, of course, assures that the union will be

[10] The lower Court's decision in this case is also in conflict with *Chicano Police Officers Ass'n* v. *Stover*, 526 F.2d 431 (C.A. 10), vacated and remanded on other grounds, 49 L. Ed. 2d 1181, where the Tenth Circuit Court of Appeals held that a police association, not recognized or certified as the exclusive representative of police officers, had standing to challenge the police department's alleged discriminatory hiring procedures under 42 U.S.C. § 1981 on its own behalf and for the benefit of its Spanish-surnamed members. See also *Memphis Am. Fed. of Teachers, L. 2032* v. *Board of Educ.*, 534 F.2d 699, 702 (C.A. 6), which should have been dispositive of the issue of standing in this case.

unable to come to the aid of those who have embraced it, thus undermining employee confidence in the union during organization and eclipsing its chances of becoming certified. Cf. *Davis* v. *R. G. Le Tourneau, Inc.*, 340 F. Supp. 882, 884 (E.D Tex. 1971). The Court below also adopted inappropriate standards to determine the propriety of preliminary relief.

These issues are of widespread public importance because they cut across the entire spectrum of organization in the airline industry which is becoming increasingly volatile. Unlike the railroads, there were few successful attempts to organize the airlines before 1936.[11] Today a large percentage of even the principal air carriers' employees are unrepresented, due mainly to the failure to organize their giant clerical, office, stores, fleet and passenger service crafts.[12] The fast-growing commuter/air-taxi segment of the industry,[13] in which nearly 3,000 carriers participate,[14] is virtually unorganized. Only 1,764 employees are covered by certifications, and a total of 39 recorded collective bargaining agreements exist, in this field of air transportation.[15] Yet the trend is toward increased employee interest in organization, as evidenced by a tripling of the number of employees involved in NMB

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[11] *Airline Experience Under the Railway Labor Act*, U.S. Dep't of Labor, BLS Bull. 1683, 1971, at 5.

[12] NMB *Forty-First Ann. Rep't*, 83 (1975).

[13] See *Commuter Air Carrier Traffic Statistics—1975*, CAB, May, 1976, at 3.

[14] *World Aviation Directory, Spring, 1976*, No. 72, Ziff-Davis Pub. Co., § A3, at 99-209.

[15] Survey of NMB Files, Research Dep't, International B'hd of Teamsters, Feb. 16-18, 1977.

representation cases from 1966 through 1975 over the previous decade.[16]

Against this background of accelerated organization, the lower Court's decision denying standing to the "only effective adversary" of carrier interference is "anachronistic." Cf. *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237; *Drivers Local 444* v. *Winter Haven Hosp.*, 279 So.2d 23, 83 L.R.R.M. 2515, 2517 (Fla. Sup. Ct. 1973). There can be no pretense that limiting the right to sue to individual workingmen will effectuate Congress' intent that the rights established in Section 2 of the Act be enforceable. See generally *Chicago & N.W. Ry.* v. *UTU*, 402 U.S. 570. Not only do individual workers recognize the imprudence of instituting formal proceedings against their employer (*NLRB* v *Indiana & Mich. Elec. Co.*, 318 U.S. 9, 17-18), but the expense of litigation surely deters employees from asserting their rights. Cf. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 420.[17]

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[16] During the 10-year period, 1966-75, the number of employees involved in NMB airline representation cases totalled 138,952, a startling increase over the 45,970 who were involved in such cases between 1956 and 1965. Source: *NMB Ann. Rep'ts 1956-75.*

[17] It is well established that a union need not be the certified representative of employees in order to set in motion the NLRB's unfair labor practice procedures under Section 10 of the National Labor Relations Act, 29 U.S.C. § 160. *NLRB* v. *Brashear Freight Lines, Inc.*, 119 F.2d 379 (C.A. 8). Under Section 2, Tenth of the RLA, 45 U.S.C. § 152, willful violations of Section 2, Third and Fourth, may be prosecuted as misdemeanors by a United States Attorney upon the application of "any duly designated representative of a carrier's employees." It is questionable whether, considering the Sixth Circuit's restrictive view of the Union's status here, such potential relief was available to the Union and employee Petitioners. But relief by way of criminal proceedings is not available as a practical matter. We know of

Thus it is not surprising that few reported cases have been brought by individuals under Section 2, Third and Fourth to challenge carrier interference with organizational efforts. See *Burke* v. *Compania Mexicana, supra,* 433 F.2d 1031; *Gioeni* v. *Alitalia Airlines,* 90 L.R.R.M. 2390 (S.D. N.Y. 1975); *Griffin* v. *Piedmont Aviation, Inc.,* 384 F. Supp. 1070 (N.D. Ga. 1974). These cases dealt with the discharges of individual union adherents and were heard long after each organization effort had ended unsuccessfully, and employee freedom of selection had already been defeated. In these circumstances the reinstatement and back pay relief sought by the individual plaintiffs in each case could do little to effectuate the statutory purpose.

Both lower Courts in the instant case, after denying the Union standing, concluded that the individual Petitioners had not demonstrated irreparable injury. Their conclusion is perhaps arguable, if the individual claims are viewed in isolation, because injury personal to individual employees sometimes can be remedied by eventual reinstatement and back pay awards. Compare *Sampson* v. *Murray,* 415 U.S. 61 with *BLE* v. *Missouri-Kansas-Texas R.R.,* 363 U.S. 528, 534. But the injury to employee organizational rights caused by an entire course of unlawful conduct, including discriminatory discharges, cannot be remedied after the Union's organization campaign collapses under the weight of carrier coercion. This injury is irreparable. Cf.

only two criminal prosecutions, in 1952 and 1976, which have been initiated pursuant to the Act. *United States* v. *Winston,* Crim. No. 75-CR-83, N.D. N.Y., Sept. 16, 1976; *United States* v. *Paca Airways, Inc.,* Crim. No. 24270, E.D. La., Feb. 15, 1952. In *Burke* v. *Compania Mexicana, supra,* 433 F.2d at 1034, the Ninth Circuit held that criminal proceedings are "inadequate to protect the organizational rights of the discharged employee."

Seeler v. *Trading Port, Inc.,* 517 F.2d 33 (C.A. 2); *Angle* v. *Sacks,* 382 F.2d 655 (C.A. 10). By denying the Union standing to seek general relief against interference with the selection rights of all employees, and limiting standing to individuals, the Courts below blinded themselves to the irreparable injury shown at the hearing. For when the damage to the Union, and thus to the organizational rights of all craft employees, is considered as a whole, it is clear that a sufficient showing of irreparable injury was made to warrant preliminary relief.

The failure of the lower Courts to find irreparable injury to the rights established by the Act and to the public interest underlies the Petitioners' request that this Court review the standards for preliminary relief adopted below. The District Court concluded that the individual Petitioners had shown "only a good possibility" of success on the merits and had not demonstrated irreparable injury. The Court of Appeals held that the District Court had not abused its discretion based on its view that a "strong likelihood of success" and irreparable injury, *inter alia,* must be shown. (App. B, pp. 14a-15a) This is an inappropriate standard in a case involving "a matter of public concern." *Virginian Ry.* v. *System Federation No. 40, supra,* 300 U.S. at 552. When the injury is severe and irreparable, as here, and important public statutory rights are at issue, the Court should balance these considerations against the showing of likelihood of success on the merits. Since there was a showing of sufficiently serious questions going to the merits at the preliminary hearing, and the balance of hardship was decidedly in the Petitioners' favor, an injunction should have issued in this case. See *County of Alameda* v. *Wein-*

berger, 520 F.2d 344 (C.A. 9); *American Basketball Ass'n Players Ass'n* v. *National Basketball Ass'n*, 404 F. Supp. 832 (S.D. N.Y. 1975).

Congress understood the danger of labor strife and its disruptive effect on commerce resulting from interference with organization for collective bargaining purposes. "To avoid any interruption to commerce," it chose to afford a fully enforceable right of self-organization. 45 U.S.C. § 151(a)(1), (2). The lower Court's explicit hostility to judicial enforcement of Section 2, Third and Fourth, and its effective diminishment of these important statutory rights, necessarily will force unions and their supporters to resort to self-help as the only viable means of combatting carrier interference.[18] Whatever "prudential" reasons the Court of Appeals saw to limit the availability of judicial relief here, they should not prevail over Congress' express will.

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[18] In *Southern Ry.* v. *Combs*, 484 F.2d 145 (C.A. 6), the Sixth Circuit Court of Appeals intimated that even self-help, in a representational context, is unavailable to employees covered by the Railway Labor Act. There the Sixth Circuit temporarily enjoined picketing of a rail carrier, noting that picketing can be enjoined when the parties may invoke the "conciliatory procedures" of the RLA, and referred the case to the NMB for a determination of whether the Act was applicable. The Board eventually held that it was not. *Southern Region Motor Transport, Inc.*, NMB File No. C-4244, Oct. 3, 1975.

CONCLUSION

For the foregoing reasons, this petition for certiorari to the Sixth Circuit Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil C-75-141

CHARLES ADAMS, et al, *Plaintiffs*

v.

FEDERAL EXPRESS CORPORATION, *Defendant*

Memorandum Decision and Order

[Filed September 10, 1975]

This is a motion for a preliminary injunction filed on behalf of the plaintiffs, Charles Adams, Larry Washington, George W. Andrews, Billy Lovett and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America against the defendant Federal Express Corporation. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §§ 1331 and 1337 and the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*

The individual plaintiffs are all former employees of the defendant, Federal Express Corporation. The plaintiff union is a labor organization which is seeking to represent a class of employees of the defendant.

The defendant is a Delaware corporation with its principal place of business in Memphis, Tennessee and is a common carrier by air engaged in the business of providing nationwide, door-to-door transportation of air express shipments.

The individual plaintiffs, Adams, Washington and Andrews, allege that they were terminated because of their union activities while the plaintiff Lovett alleges that he was promoted and subsequently refused reemployment (after a voluntary resignation) because of his union activi-

ties, all in violation of the Railway Labor Act. Plaintiff union alleges that the defendant is engaging in a widespread and pervasive course of conduct which interferes with, influences and coerces its employees in an effort to induce them not to join the plaintiff union.

The instant controversy centers around an effort to unionize the defendant company.

The preliminary injunction is an extraordinary remedy and its grant or denial is a matter within the discretion of the trial court. The plaintiff must show that there is a probability he will succeed on the merits, that irreparable harm will result if the injunction is not granted, that the irreparable harm plaintiff will suffer is greater than the harm defendant will suffer if the injunction is granted and that the granting of the injunction is in the public interest. *See* II Wright and Miller, Federal Practice and Procedure § 2948 at 430-31 (1973).

An extensive hearing was held on this motion for a preliminary injunction. We have reviewed the transcript of the proceedings and the briefs and conclude that the plaintiffs have not made a sufficient showing for the grant of a preliminary injunction.

Before stating the reasons for the foregoing conclusion we will address the issue of the standing of the plaintiff union. The plaintiff union is not the certified representative of any class of employees of the defendant company. And while there appears to be a dearth of case law on the question of whether an uncertified labor organization has standing to sue under the Railway Labor Act, we are of the opinion that the rule in the Sixth Circuit is that they do not. The Sixth Circuit in *IBT* v. *Zantop*, 394 F.2d 36 (6th Cir. 1968) while dismissing the appeal there as moot appears to have impliedly agreed with the lower court's decision. In *Zantop* the Teamsters' Union brought suit under the Railway Labor Act against the defendant company, charging it with engaging in various acts of unlawful

conduct during the union's organizational campaign. The District Court, in an unreported decision, held "that an uncertified labor organization could not enforce such rights for the employees it sought to represent." *Zantop, supra*, at 38. Prior to the decision on appeal the National Mediation Board certified the Airline Pilots Association, International as bargaining representative of the defendant's employees. The Sixth Circuit took judicial notice of that fact and dismissed the appeal as moot. The court stated:

> This action was brought by the Teamsters to obtain judicial enforcement of employee rights to select the Teamsters as their bargaining representative. During the pendency of this appeal the underlying representational dispute has been terminated and a bargaining representative has been certified by the Board.
>
> *Zantop, supra* at 40.

The court seems to state here that since the Teamsters were not certified as the representative of the defendant's employees then they were not the proper parties to prosecute the lawsuit. It is clear from the court's holding that if the Teamsters had been certified as the representative of the defendant's employees the case would not have been rendered moot.

Plaintiff union contends, however, that it has a personal stake in the outcome of this controversy and has a nexus with the interests of the defendant's employees sufficient to establish its standing to sue. This is not a public interest civil rights case, *NAACP* v. *Alabama*, 357 U.S. 449 (1958), or environmental case, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). There are available plaintiffs here with a direct personal and financial interest in the outcome of this litigation. According to the union's logic any number of unions that desire to represent defendant's employees could seek to be parties in this litigation or bring suit on their own.

The union directs our attention to numerous cases under the National Labor Relations Act holding that an uncertified labor organization has standing to sue. While cases under that Act are instructive in construing the Railway Labor Act, they are not controlling. Accordingly, we hold that the plaintiff, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, does not have standing to bring this lawsuit.

We have previously ruled that the individual plaintiffs have standing. *See Burke* v. *Compania Mexicana de Aviacion, S.A.*, 433 F.2d 1031 (9th Cir. 1970).

In regard to the issue of whether a preliminary injunction should be issued we initially find that there is only a good possibility that the plaintiffs will succeed on the merits. We cannot and are not saying that the plaintiffs will in fact succeed on the merits but we do state for purposes of the instant motion that from the evidence heretofore presented to the court the plaintiffs have such a possibility of success on the merits.

We are not persuaded, however, that the plaintiffs will suffer irreparable harm if we do not grant the injunction sought by plaintiffs. Nor are we persuaded that the balance of harm, if any, will be unduly on the plaintiffs. Rather it appears that the defendant will suffer irreparable harm if the injunction sought is granted. Finally we find that the public interest will not be served through granting the injunction sought by the plaintiffs.

We make these findings based on the testimony of the witnesses in open court and a careful review of the transcript. It does not appear at this point that the defendant, its agents or employees were engaged in any conscious concerted attempt to violate the provisions of the Railway Labor Act. The management admittedly was not in favor of the union and communicated that disfavor to the employees. Such action does not warrant the extraordinary

remedy sought here. And while it may appear that some or all of the individual plaintiffs were discharged because of their union activities, the company advanced legitimate plausible reasons for their discharge. The record at this point does not support a finding that the defendant has or had a practice of discharging employees that were union advocates.

Accordingly, we conclude that the motion for a preliminary injunction will be denied. It is so ORDERED.

We further conclude that the motion to dismiss the Teamsters' action heretofore held under advisement, will be granted, and the Clerk will enter a final judgment to that effect.

ENTER this 10th day of September, 1975.

/s/ BAILEY BROWN
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action File No. C-75-141

(Caption omitted in printing)

Corrected Judgment

(Filed September 10, 1975)

This action came on for consideration before the Court, Honorable Bailey Brown, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is ORDERED and ADJUDGED that in accord with the MEMORANDUM DECISION AND ORDER entered by the Court on September 10, 1975, the Complaint of Plaintiff, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA is hereby DISMISSED.

Dated at Memphis, Tennessee, this 10th day of September, 1975.

/s/ J. FRANKLIN REID
Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action No. C-75-141

(Caption omitted in printing)

Order for Final Judgment Under Rule 54(b)

(Filed June 2, 1976)

Plaintiffs having moved for an express determination that there is no just reason for delay and express direction for the entry of Final Judgment in this cause as to the Court's Memorandum Decision and Order of September 10, 1975, and the Court having considered said Motion, the Court is of the opinion that the Motion is well taken as to the Order dismissing the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers as a party Plaintiff and denying preliminary injunction.

IT IS THEREFORE BY THE COURT ORDERED, ADJUDGED AND DECREED that, as to the Order dismissing the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as a party Plaintiff, and the Order denying preliminary injunction, the Court expressly determines that there is no just reason for delay and expressly directs the Clerk to enter a Final Judgment in this cause.

No such determination is made or Final Judgment entered as pertains to the relief sought by the individual Plaintiffs in this cause other than the denial of preliminary injunction.

/s/ BAILEY BROWN
Judge

HOWARD R. PAUL /s/
Attorney for the Plaintiffs

SCOTT MAY /s/
Attorney for the Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Civil Action File No. C-75-141

(Caption omitted in printing)

Judgment

(Filed June 2, 1976)

This action came on for trial (hearing) before the Court, Honorable Bailey Brown, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is ORDERED and ADJUDGED in compliance with an order entered by the Court on June 2, 1976, this cause is DISMISSED as to International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

It is further ORDERED that the preliminary injunction prayed for in this cause is denied.

Dated at Memphis, Tennessee, this 2nd day of June, 1976.

/s/ J. FRANKLIN REID
Clerk of Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-2340

CHARLES ADAMS, ET AL., *Plaintiffs-Appellants,*

v.

FEDERAL EXPRESS CORPORATION, *Defendant-Appellee.*

APPEAL from the United States District Court
for the Western District of Tennessee.

Decided and Filed December 16, 1976.

Before PHILLIPS, *Chief Judge*, and PECK and MCCREE, *Circuit Judges.*

PHILLIPS, *Chief Judge.* This is a joint appeal by the International Brotherhood of Teamsters, Warehousemen and Helpers of America and four individual employees from a decision denying a preliminary injunction and dismissing the Teamsters as a party to the litigation. The memorandum opinion of Chief District Judge Bailey Brown is reported at 90 L.R.R.M. 2742.

The appeal presents two questions:

1. Does an uncertified labor organization have an express or implied right to maintain an action under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*? and

2. Did the District Court abuse its discretion in denying the motions for preliminary injunction in the labor dispute involved in this case?

The District Court dismissed the Teamsters' action. We affirm on authority of *IBT* v. *Zantop*, 394 F.2d 36 (6th Cir. 1968). We also affirm the judgment of the District Court in denying the motion for preliminary injunction.

I. Jurisdiction

This case centers around an effort by the Teamsters to unionize Federal Express, a chartered air freight carrier engaged in operating a parcel delivery service. As such the defendant company is a common carrier engaged in interstate commerce and subject to the provisions of the Railway Labor Act.

This action was filed by the Teamsters Union and an employee and three former employees of Federal Express alleging violation of § 2, third and fourth of the Act. These sections give the right to employees, *inter alia*, to organize and bargain collectively through representatives of their own choosing without interference by the carrier. The complaint charges that these rights were violated by the Company's threats, harassment, surveillance activities and selective discharges during the course of the organizational drive. Three individual plaintiffs, Adams, Washington and Andrews, allege that they were discharged because of their Union activities. The complaint seeks their reinstatement with back pay. Plaintiff Lovett avers that he initially was refused re-employment, after a voluntary resignation to enter the Air Force, because of his Union activities, and that he was rehired only because it was mandated by the Military Selective Service Act of 1967.[1] The plaintiff sought a preliminary injunction to restrain the company from: threatening employees with economic reprisals because of their participation in organizational activity on behalf of the Union; interrogating employees about Union activities; engaging in surveillance; and harassing employees.

Except for the fact that Federal Express is a common carrier subject to the Railway Labor Act, this proceeding would be within the exclusive jurisdiction of the National Labor Relations Board and not within the jurisdiction of a United States District Court.

[1] 50 U.S.C. §§ 451, 459(b).

We are reluctant to impose upon a District Court duties analogous to those of the National Labor Relations Board under a different statute, which are best resolved by an administrative agency rather than the judiciary. We would prefer to hold that the District Court has no jurisdiction and that exclusive jurisdiction is in the National Mediation Board. *Compare Brotherhood of Railway and Steamship Clerks* v. *United Airlines*, 325 F.2d 576 (6th Cir. 1963).

Unfortunately, Congress has not so provided with respect to those parts of the Railway Labor Act here involved. We are bound by compelling judicial precedent to hold that the District Court has jurisdiction. *Virginia Railway Co.* v. *System Federation*, 300 U.S. 515, 542-44 (1937); *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks*, 281 U.S. 548, 567-71 (1930); *Burke* v. *Compania Mexicana de Aviacion*, 433 F.2d 1031 (9th Cir. 1970). *See also Chicago & N.W. R. Co.* v. *Transportation Union*, 402 U.S. 570, 577-81 (1971).

II. Status of Uncertified Union

We now come to the question of whether there is a right of action, express or implied, in favor of an uncertified Union under the Act. This question is implicitly answered in the negative by the decision of this court in *I.B.T.* v. *Zantop, supra*, 394 F.2d 36 (6th Cir. 1968).

In *Zantop* the Teamsters filed an action seeking judicial relief against alleged unlawful carrier interference with the statutory rights of employees under the Railway Labor Act. The Teamsters Union was not the certified representative of the employees at the time the suit was instituted or at any time thereafter. The District Court did not question the right of employees, either individually or in concert, to obtain judicial relief for violation of their organizational rights under the statute. It held that an uncertified labor organization could not enforce such rights for the employees it sought to represent. 394 F.2d at 38. After

the decision of the District Court, the National Mediation Board certified a rival union as bargaining representative. This court dismissed the appeal as moot. The Teamsters urged that a discharged employee be reinstated with back pay. This court said:

> The Teamsters Union also requested that discharged employee Marvin Kagan be reinstated with back pay. This matter cannot be considered by this Court because it involves the private statutory rights of the discharged employee who is not a party to this action. 394 F.2d at 41.

We find no express provision in the Railway Labor Act conferring a right of action on an uncertified Union to file suit on behalf of employees it seeks to represent. Section 2, Fourth, 45 U.S.C. § 152, Fourth, provides that "Employees shall have the right to organize and bargain collectively through *representatives* of their own choosing." (Emphasis added.) Section 2, Ninth, 45 U.S.C. § 152, Ninth, authorizes the National Mediation Board to determine disputes as to who are the representatives of the employees "designated and authorized in accordance with the requirements of this Chapter" and to certify a designated Union as bargaining agent. In the present case the National Mediation Board conducted an election in which the Teamsters received only eleven votes out of 104 eligible employees. The Board found no basis for certifying the Teamsters Union as bargaining representative. The decision of the Board is made an Appendix to this opinion.

We read *Zantop* to stand implicitly for the proposition that the Railway Labor Act confers no express or implied cause of action in favor of an uncertified union.

On the issue of whether a statute confers an implied right of action, the Supreme Court in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), said:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, ether to create such a remedy or to deny one? See, *e.g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e.g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U.S. 134 (1964).

Applying the foregoing factors enumerated by the Supreme Court, we conclude that the Railway Labor Act confers no implied right of action upon an uncertified union to maintain a suit on behalf of employees it seeks to represent. Accordingly, we affirm the judgment of the District Court in dismissing the action filed by the Teamsters.

III. Injunction

Finally, we consider the scope of review on appeal from the action of the District Court in denying the preliminary injunction. The granting or denial of a preliminary injunction is within the sound judical discretion of the trial court. *Virginia Railway Co.* v. *System Federation, R.E.D.*, 300 U.S. 515, 551 (1937); *Brandeis Machinery & Supply Corp.* v. *Barber-Greene Co.*, 503 F.2d 503 (6th Cir. 1974); *North Avondale Neighborhood Ass'n.* v. *Cincinnati Metropolitan Housing Authority*, 464 F.2d 486 (6th Cir. 1972); *Hornback* v. *Brotherhood of Railroad Signalmen*, 346 F.2d 161 (6th Cir. 1965). On appeal the denial of such an injunction will not be disturbed unless contrary to some rule of equity or an abuse of discretion. *United States* v. *Corrick*, 298 U.S. 435 (1936); *Nashville I-40 Steering Committee* v. *Ellington*, 387 F.2d 179 (6th Cir. 1967).

Numerous events are charged to have occurred during the organizational effort. These include alleged retaliatory transfer of plaintiff Lovett, a skilled mechanic, because of his Union activities. However, the company points out that the transfer was, in fact, a promotion. The plaintiffs contend that plaintiff Adams was fired for his vigorous Union activities, while Federal Express asserts that Adams' record of tardiness and absenteeism and his refusal to obey a direct order of a superior led to the dismissal. Further, the plaintiffs argue that Federal Express instituted an employee incentive program to dissuade its employees from unionizing. The company responds that the program was open to all employees and managers, not just the few who might be involved in the organizational dispute.

After six days of hearings in open court the District Court concluded:

> We make these findings based on the testimony of the witnesses in open court and a careful review of the transcript. It does not appear at this point that the defendant, its agents or employees were engaged in any conscious concerted attempt to violate the provisions of the Railway Labor Act. The management admittedly was not in favor of the union and communicated that disfavor to the employees. Such action does not warrant the extraordinary remedy sought here. And while it may appear that some or all of the individual plaintiffs were discharged because of their union activities, the company advanced legitimate plausible reasons for their discharge. The record at this point does not support a finding that the defendant has or had a practice of discharging employees that were union advocates.

In determining whether the District Court abused its discretion we must consider whether the plaintiffs have shown a strong likelihood of success on the merits; whether the plaintiffs have shown irreparable injury; whether the issuance of a preliminary injunction would cause substantial harm to others; and where the public interest lies. *North Avondale Neighborood Ass'n.* v. *Cincinnati Metropolitan Housing Authority, supra.*

The facts in this case are contested. For example, with respect to the firing of Larry Washington, a party plaintiff, the date of the firing is disputed as well as the reason behind it. The company claims that Washington was discharged for sleeping in the restroom and past infractions, while plaintiffs assert that his Union activities led to all of the disciplinary actions and his discharge.

Plaintiffs contend that in early March, 1975, Nelson Johnson, a Federal Express supervisor, told the employees that if a union came in, those responsible would be fired and the company would get tough with its employees. Plaintiffs also assert that another company manager, Ron Ford, told an employee that discipline would be tightened. Ford and Johnson specifically denied making any such statements.

The right of employees to organize, free from interference and coercion by their employer, is rooted in the freedom of citizens of a free society to organize for lawful purposes. *See Delaware & Hudson Railway Co.* v. *United Transportation Union,* 450 F.2d 603 (D.C. Cir. 1971). In cases such as the present one, a District Court must exercise great care to prevent the employees' right to organize from becoming illusory.

However, in view of our limited scope of review, we do not consider the merits of the case further than to determine whether the District Judge abused his discretion in denying the preliminary injunction. *Brandeis Machinery & Supply Corp.* v. *Barber-Greene Co., supra; American Federation of Musicians* v. *Stein,* 213 F.2d 679 (6th Cir.), *cert. denied,* 348 U.S. 873 (1954). Upon examination of the entire record we find no abuse of discretion.

Affirmed.

APPENDIX

NATIONAL MEDIATION BOARD
WASHINGTON, D. C. 20572

Case No. R-4565

In the matter of
REPRESENTATION OF EMPLOYEES
of
FEDERAL EXPRESS CORPORATION
Mechanics and Related Employees

Dismissal

January 13, 1976

The services of the National Mediation Board were invoked by the International Brotherhood of Teamsters, Airline Division on April 14, 1975, to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of Mechanics and Related Employees, employees of Federal Express Corporation.

At the time application was received, these employees were not represented by any organization or individual.

The Board assigned Mediators John B. Willits and Thomas R. Roadley to investigate.

FINDINGS

The investigation disclosed that a dispute existed among the employees concerned and by direction of the Board, the mediator was instructed to conduct an election by secret ballot to determine the employees' representation choice.

The following is the result of the election as reported by Mediator Thomas H. Roadley who was assigned to count

the ballots in this case and attested thereon by a party observer.

Number of Employees Voting:

International Brotherhood of Teamsters, Airline Division Mechanics & Related Employees	11

Number of Employees Eligible
104

The National Mediation Board further finds that the carrier and employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties were given due notice of investigation.

On the basis of the investigation and report of election which shows that less than a majority of eligible employees cast valid ballots in the election, the National Mediation Board finds no basis for Certification and the application is therefore dismissed.

By order of the NATIONAL MEDIATION BOARD.

/s/ Rowland K. Quinn, Jr.
ROWLAND K. QUINN, JR.
Executive Secretary

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Caption Omitted in Printing)

Before: PHILLIPS, *Chief Judge*, and PECK and MCCREE, *Circuit Judges*.

Judgment

(Filed December 16, 1976)

APPEAL from the United States District Court for the Western District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiffs-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

JOHN P. HEL

Clerk

Issued as Mandate: January 18, 1977

COSTS: To be recovered by Appellee

Filing fee	$ .....
Printing	$ 502.11
Total	$ 502.11

APPENDIX D

Statutes Involved

Railway Labor Act, as amended, Section 1(a), 45 U.S.C. § 151(a); Section 2, Third, 45 U.S.C. § 152, Third; Section 2, Fourth, 45 U.S.C. § 152, Fourth; Section 2, Ninth, 45 U.S.C. § 152, Ninth; and Section 2, Tenth, 45 U.S.C. § 152, Tenth.

Section 1(a) of the Act states:

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Section 2, Third states:

> Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Section 2, Fourth states:

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions; *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Section 2, Ninth states:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the

employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Section 2, Tenth states:

Tenth. The willful failure or refusal of any carrier, its officers, or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine or not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section,

and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1278

CHARLES ADAMS, LARRY WASHINGTON, GEORGE W. ANDREWS, BILLY LOVETT, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OCTOBER TERM, 1976

No. 76-1278

CHARLES ADAMS, LARRY WASHINGTON, GEORGE W. ANDREWS, BILLY LOVETT, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Charles Adams, Larry Washington, George W. Andrews, Billy Lovett, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America have prayed that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Decision and Order of the United States District Court for the Western District of Tennessee is unofficially reported at 90 LRRM 2742; it is reprinted in Appendix A,

pages 1a-5a of the Petition. The Opinion of the Sixth Circuit Court of Appeals is unofficially reported at 94 LRRM 2008; it is reprinted in Appendix B, pages 9a-17a of the Petition. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§1331, 1337 and 45 U.S.C. §151, *et seq.* The jurisdiction of the Sixth Circuit Court of Appeals was based on 28 U.S.C. §§1291, 1292(a).

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on December 16, 1976. It is reprinted in Appendix C, page 18a of the Petition. This Court has jurisdiction under 28 U.S.C. §1254(1). The Petition for a Writ of Certiorari was timely filed with this Court.

QUESTIONS PRESENTED

1. Does an uncertified labor organization engaged in an active attempt to organize the employees of an air carrier for purposes of collective bargaining under the Railway Labor Act, 45 U.S.C. §151, *et seq.*, have standing to seek injunctive relief against the employer's alleged interference with the employees' organizational rights protected by Section 2, Third and Fourth of the Act where:

   (a) Such relief is sought by the organization on its own behalf to prevent the employer's alleged destruction of the organizational campaign; and,

   (b) The organization is seeking relief against alleged violations of the statutory rights of employees who have executed an instrument entitled "Request for Employees Representation Election Under the Railway Labor Act?"

2. What standards must be met in order to obtain preliminary injunctive relief against alleged pre-election carrier interference with the organizational rights of employees?

STATUTES INVOLVED

This case involves 45 U.S.C. §§151 and 152. Said statutes are reprinted in Appendix A, pages 1A-10A, *infra*.

STATEMENT OF THE CASE

1. The Factual Background

Respondent, Federal Express Corporation (Federal Express), is a Delaware corporation, incorporated in 1971, with its principal place of business being the corporate headquarters in Memphis, Tennessee; there it maintains: an administrative headquarters, a large package sorting facility ("Hub"), a maintenance operation for its aircraft and other related facilities (J.A. 196).[1] Federal Express is a chartered air freight carrier, subject to the Federal Aviation Act of 1958, 49 U.S.C. §1301, *et seq.*; it began operation in mid-1972 as an air taxi operation. The carrier specializes in providing an expedited, small-parcel cargo service between Memphis and major market areas located in some seventy (70) cities throughout the United States. Federal Express employs a fleet of approximately thirty (30) Falcon jet aircraft for intercity, interstate shipment; these aircraft are operated by pilots who are trained at

1. Reference "J.A." used in the following paragraphs refers to the Joint Appendix in Case No. 75-2340, which Petitioners have requested the Sixth Circuit to certify to this Court pursuant to Rule 21(1).

the Federal Express facilities in Memphis. Federal Express operates by flying a "clearing house pattern" where most aircraft originate in outlying areas (transit cities), pick up their aggregate inbound production, and arrive at the central terminal, Memphis, where the pieces are sorted by destination, loaded on outbound aircraft, which then in turn retrace the trips to the seventy (70) cities, aforementioned. When the packages arrive at the various destination cities, they are unloaded by employees of Federal Express, loaded on vans leased and operated by Federal Express, and delivered to the ultimate recipients, the addressees.

Federal Express currently employs in excess of fifteen hundred (1500) persons, both in the Memphis facility and in the approximate seventy (70) outlying cities that it serves; included in these employees are pilots, truck drivers (couriers), sorters and handlers, engineers, mechanics, as well as a large contingent of office and supervisory personnel.

During the early part of February, 1975, the management of Federal Express was notified by the International Brotherhood of Teamsters, Airline Division (Teamsters), that the Teamsters intended to begin a nationwide organization drive in which it would attempt to organize both the maintenance employees in Memphis, the Hub employees in Memphis, as well as the station employees in various cities throughout the country. At the request of the Teamsters, several officials of Federal Express flew to California on February 11, 1975, and met with M. L. Griswold, Director of the Teamster Airline Division.

Upon their return to Memphis, officials of Federal Express issued a memorandum to its employees which completely outlined the meeting and the proposal of the Teamsters (J.A. 393-395).

(a) Discharge of Larry Washington.

Petitioner Larry Washington was employed as a Hub worker on February 21, 1974, and was discharged on February 7, 1975, as is reflected in the employee status form (J.A. 373), after he acquired three (3) disciplinary letters in his file, the last disciplinary letter having been issued after he was found, by his supervisor, sleeping in the men's bathroom in a locked stall, sitting on the commode with his pants up and belted, and his head down on his chest (J.A. 376).

It should be noted that this discharge took place approximately four (4) days prior to the meeting held in California between officials of Federal Express and the Teamsters, and prior to the start of the union's campaign.

(b) Campaign Activities and Events in March, 1975.

From mid-February and continuing through March and April of 1975, the Teamsters carried on an extensive nationwide campaign to organize employees of Federal Express with the main emphasis being placed on employees at the Memphis facility; they held meetings at least on a weekly basis and invited all employees of Federal Express to attend (J.A. 323). During this time period, the Teamsters solicited signatures of the various Federal Express employees on a printed form entitled "Request for Employees Representation Election Under the Railway Labor Act" (Exhibit No. 29, J.A. 420); this form being similar, if not identical, to all the standard forms utilized by labor organizations in attempting to obtain a "showing of interest" in order that an election might be held under the provisions of the National Labor Relations Act, as

well as provisions of the Railway Labor Act[2], said cards are generally known as "authorization cards" and create absolutely no agency relationship, either express or implied, but are utilized by the National Mediation Board to determine whether or not a "representation dispute" exists.

(c) Transfer of Billy Lovett.

Petitioner Billy Lovett was first employed by Federal Express in August of 1972 and remained a Federal Express employee until he voluntarily quit to go into the military service on April 28, 1975 (J.A. 87). He began his employment as an apprentice mechanic, worked up to the position of mechanic, and then was promoted to lead man approximately one (1) year before he left the company.

In March of 1975, the company being aware that Lovett was leaving for military service at the end of April, promoted Lovett to a salaried position in the training department. He was told that he was receiving this promotion because of his experience with the company and because the company felt that he could do a good job. Because he was going into the military, this would give another man a chance to move up to the position that he currently held, that of lead man (J.A. 77).

Lovett, although initially dissatisfied with the promotion and transfer, finally agreed to accept the job stating that there was no use in keeping someone else from mak-

2. National Mediation Board Rules, Title 29, Chapter X, C.F.R. §1206. "Where the employees involved in a representation dispute are unrepresented, a showing of proved authorizations from at least thirty-five (35) percent of the employees in the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of Section 2, Ninth, of the Railway Labor Act."

ing a good bit more money and holding them back (J.A. 82).

Although the company had been aware of Mr. Lovett's pro-union sentiments for over a year (Lovett was involved in another unionization attempt at Federal Express approximately twelve months prior to the Teamster campaign.), he had been continually promoted and given jobs of more responsibility during that time (J.A. 83). During Lovett's tenure in the training department, he was in constant contact with the mechanic employees, there was no attempt to isolate him from them (J.A. 340-341).

(d) Discharge of Charles Adams.

Petitioner Charles Adams, a janitor, was discharged on March 12, 1975, because he had received numerous disciplinary letters resulting from his tardiness and absenteeism, and finally, on that date, he received his last disciplinary letter for refusing to obey a direct order of his superior (J.A. 381-384).

Petitioner Adams was ordered to remove a "Go Teamster" button and he refused; however, he admitted that during his normal work day he would go into the area where engines were being worked on and outside of the office building in the area where jet planes operated, and therefore, there was the distinct possibility that the "Go Teamster" button he was wearing could fall off and be ingested into a jet engine, thus causing great property damage and threat of bodily harm to individuals in the area (J.A. 67).

(e) Discharge of George Andrews.

Petitioner George Andrews was discharged due to frequent absenteeism and tardiness, having received three

(3) previous letters of reprimand prior to the letter he received on April 10, the date of his discharge (J.A. 386-390).

Petitioner Andrews alleged that he was discharged because of his union activities; however, his personnel record reflects that he began receiving disciplinary letters in October of 1974, was given a three (3) day suspension in January of 1975. He admitted that he did not become involved with the union activity until February of 1975 (J.A. 160-161).

(f) NMB Election.

After the District Court hearing and decision, but prior to the argument of the matter on appeal to the Sixth Circuit, an election was held among the mechanics and related employees of Federal Express. On January 13, 1976, the National Mediation Board dismissed the Petition based on the results of that election in which the Teamsters received eleven (11) out of a possible one hundred four (104) votes (Petitioners' Appendix, pages 16a-17a).

2. Proceedings Below

A. Proceedings In The District Court

Petitioners instituted this action in the District Court against Federal Express alleging that the carrier had interfered with, coerced and restrained its employees in the exercise of their organizational rights in violation of Section 2, Third and Fourth of the Railway Labor Act, 45 U.S.C. §152.

After a six (6) day hearing, and submission of briefs by all parties, the District Court dismissed the Teamsters' Complaint and denied the individual plaintiffs' Motion for Preliminary Injunctive Relief.

The District Court found that the Teamsters lacked "standing" to bring the suit and that the individual plaintiffs had not carried their burden as to the issuance of the Preliminary Injunction; the District Court holding that the plaintiffs have failed to prove that they will suffer irreparable harm if the injunctive relief is not granted, and further, that the defendant would, in fact, suffer irreparable harm if the injunction sought were granted; the District Court further found that the public interest would not be served by the granting of the injunction sought.

The District Court reasoned that although the management of Federal Express was admittedly not in favor of the union and had communicated that disfavor to the employees, that such action by Federal Express did not warrant that extraordinary remedy sought by the plaintiffs, the record before the Court not supporting a finding that Federal Express has or had a practice of discharging employees that were union advocates (Petitioners' Appendix A, pages 4a-5a).

B. Proceedings In The Court Of Appeals

The plaintiffs filed a joint appeal from the decision of the District Court denying the preliminary injunction and dismissing the Teamsters as a party to the litigation. On December 16, 1976, Chief Circuit Judge Phillips, speaking for the panel which heard the appeal, issued its opinion and judgment affirming the District Court, both as to the dismissal of the Teamsters' action and as to the denial of the Motion for Preliminary Injunction.

The Circuit Court first addressed itself to the issue of "jurisdiction" of the District Court to hear the matter at all, stating that it was reluctant to impose upon a District Court duties analogous to those of an administrative agency; however, the Circuit Court properly found that

the District Court has the requisite jurisdiction pursuant to a number of decisions of this Court.

The Circuit Court then addressed the "standing" of an uncertified union to seek relief under provisions of the Railway Labor Act; the Circuit Court found, based on its prior decision in *IBT* v. *Zantop*, 394 F.2d 36 (6th Cir. 1968), that the Railway Labor Act confers no express or implied cause of action in favor of an uncertified union to file suit on behalf of employees it seeks to represent, seeking injunctive relief enjoining the carrier from violations of provisions of the Railway Labor Act.

The Circuit Court also affirmed the ruling of the District Court in denying the Motion for Preliminary Injunction, holding that the granting or denial of a Preliminary Injunction is within the sound judicial discretion of the trial court and it will not be disturbed unless contrary to some rule of equity or an abuse of discretion. The Circuit Court reviewed the findings of fact concerning the various alleged discriminatory acts, found the facts in the case to be heavily contested, and further found that the District Court did not abuse its discretion in denying the injunctive relief sought. The Circuit Court specifically affirmed the test for the issuance of a Preliminary Injunction utilized by the District Court (Petitioners' Appendix B, pages 9a-17a).

REASONS FOR DENYING THE WRIT

I.

The Court Below Has Decided An Important Federal Question But Not In Conflict With This Court's Decisions And Well Established "Standing" Principles.

In holding that an uncertified labor organization (the Teamsters in the instant case) does not have an express or implied right to maintain an action under the Railway Labor Act, 45 U.S.C. §151, *et seq.*, the District Court and the Circuit Court have decided an important question of Federal law which has not been settled by this Court; however, this decision of the Court of Appeals for the Sixth Circuit is not in conflict with a decision of any other Court of Appeals, nor in conflict with any decision of this Court.

The factual issues concerning the dismissal of the Teamsters' action are not in dispute, for the union admits in its Complaint, its Brief to the Sixth Circuit, and its Petition for Certiorari to this Court that it is not a party to any collective bargaining agreement or other contract with Federal Express, and that the union is merely "seeking" to become the "representative." Neither 45 U.S.C. §152, Third and Fourth, nor the Railway Labor Act in general, give any right or standing to an "uncertified" labor organization, but confer rights and duties only upon the *carrier* and the *employees*.

The term "representative," as used in the Railway Labor Act, is defined in 45 U.S.C. §151, Sixth:

> "The term 'representative' means any person or persons, labor unions, organization, or corporation, *designated* either by a carrier or group of carriers or

by *its or their employees*, to act for it or them." (Emphasis added.)

Under the provisions of the Railway Labor Act, there is one and only one way in which a labor union or organization may become the "representative" of the employees of a carrier governed by said Act, and that is for that union to "obtain certification" from the National Mediation Board pursuant to 45 U.S.C. §152, Ninth. *Virginia Railway Company* v. *System Federation No. 40*, 300 U.S. 515.

The decision of the Sixth Circuit Court of Appeals is in accord with decisions of this Court holding that a private right of action is available *only* to employees or to "certified" representatives of said employees.

Petitioners' reliance on this Court's decision in *Texas & N.O.R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548, is misplaced, for in that case the Brotherhood had been authorized by a majority of the employees of the Railroad Company to represent them in all matters relating to their employment, and that representation had been recognized by the Railroad Company for a number of years. The difficulty, leading to the injunction granted to the Brotherhood, arose only after the Brotherhood applied for an increase in the wages of the railway clerks, and that request was denied. The Railroad Company subsequently endeavored to intimidate its employees to join a rival "company union," thus, the facts in the instant case, and the facts dealt with by this Court in *Texas & N.O.* are distinguishable; therefore, the decision of the Circuit Court was proper.

It is stipulated by the respondent that an individual employee of a carrier may bring suit under Section 2, Third and Fourth of the Act against his employer to halt

coercive acts against him personally and coercive acts directed at his fellow employees. *Burke* v. *Compania Mexicana De Aviacion, S.A.*, 433 F.2d 1031 (C.A. 9, 1970); *Griffin* v. *Piedmont Aviation, Inc.*, 87 L.R.R.M. 2764 (N.D. Ga., 1974).

The petitioner, however, would have this Court hold that an uncertified union has standing to sue, but the petitioner is unable to find any case law from this Court, or a lower court in which the relief sought by the Teamsters herein has been granted under the Railway Labor Act. Therefore, the Teamsters requested both the District Court and the Court of Appeals for the Sixth Circuit to make a "leap of faith" and apply the rationale and reasoning from cases decided under the National Labor Relations Act, an act which has absolutely no bearing on the instant case; the Teamsters now requests that this Court make the same "leap of faith" that was rejected by both the lower courts.

Although both the Railway Labor Act and the National Labor Relations Act deal with the relationship between employer and employee, the similarity ends at that point. The National Labor Relations Act is far more detailed and far more specific as to the particular acts that it condones and the particular acts that it prohibits. Additionally, the National Labor Relations Act specifically gives rights to an "uncertified union" to file charges before the National Labor Relations Board (*N.L.R.B.* v. *General Shoe Corp.*, 191 F.2d 504 (C.A. 6th, 1951)). No such specific authorization is found anywhere in the Railway Labor Act.

The varied groups of employees with which the two Acts deal are also entirely different; pursuant to provisions of the National Labor Relations Act, the National Labor Relations Board may hold an election in a "collective

bargaining unit" of employees in *one particular office* of the employer in *one city* even though that employer might have many employees doing exactly the same job in many different offices or plants within the same city, as well as different offices and plants scattered across the country. However, the National Mediation Board, pursuant to the dictates of the Railway Labor Act, does not have such latitude and must certify "craft or classes" of employees of a particular employer (carrier) throughout the entire country.

As noted by the National Mediation Board in its Case No. R-1447, *American Airlines, Inc. Airline Mechanics, Fleet Service Personnel* (1945) (National Mediation Board Craft or Class Cases, Vol. 1, p. 394):

> "We think it manifest, from a comparison of the related clauses of the two acts (National Labor Relations Act and Railway Labor Act) that the National Mediation Board does not enjoy the wide latitude of discretion which Congress granted to the National Labor Board. The Railway Labor Act deals only in terms of 'craft or class;' no other unit of collective bargaining is considered. There is no authorization to the Board to subdivide or sectionalize, or to designate a representative on any other basis than the craft or class unit." (p. 399).

The Teamsters contend that they have two claims of "standing": (1) that the union has suffered *actual injury* by the carrier's action which threatened to destroy its organizational campaign and thereby prevent the union from becoming the certified representative of the mechanic craft or class; and, (2) that the union could represent employee *supporters* (as opposed to members) who themselves had suffered alleged injury as a result of the carrier's conduct.

In the lower courts the Teamsters have classed the standing arguments in regard to the question of their "personal stake" in the outcome of the controversy and their having a "nexus" with the interest of the respondents' employees sufficient to establish its standing to sue.

Both lower courts have been quick to note, however, that the instant litigation is not a "public interest civil rights case" citing *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958), nor an "environmental case" citing *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

The Teamsters in their argument as to standing have relied on this Court's opinion in *Sierra Club, id.;* however, this reliance is misplaced, for this Court found (405 U.S. 727, 735) that the Sierra Club failed to allege that any of its members would be affected in any of their activities or pastimes by the development which was complained of in that case.

In the instant case, it is admitted by all parties that there are *no members* of the Teamsters who are employees of Federal Express; therefore, the Teamsters cannot be representing any interest of its "members."

Furthermore, the Teamsters' reliance on this Court's recent opinion in *Warth* v. *Seldin*, 422 U.S. 490 (1975) is also misplaced, for as this Court found there, none of the plaintiffs or intervenors had standing to sue:

> "As we have observed above, Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute (citing cases). No such statute is applicable here."

Just as no statute was applicable to the various plaintiffs and intervenors in *Warth* v. *Seldin*, no statute is "explicitly" applicable to the Teamsters in the instant case.

The question then remains as to whether the Railway Labor Act confers an "implied" right of action on an uncertified labor organization. This Court in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975) held, as quoted by the Sixth Circuit in the instant case:

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Company* v. *Rigsby*, 241 U.S. 33, 39 (1916) (Emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, emplicit or implicit, either to create such a remedy or to deny one? See e.g., *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U.S. 453, 458, 460 (1974) (Amtrak). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, e.g. *Amtrak, supra; Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U.S. 134 (1964)."

Applying the foregoing directives of this Court, the Sixth Circuit correctly concluded that the Railway Labor Act confers no *implied* right of action upon an uncertified union to maintain a suit on behalf of employees it seeks to represent, nor on its own behalf.

This Court in *General Committee* v. *M.K.T.R.*, 320 U.S. 323 (1943), in reversing both the lower courts and denying the relief sought by the union therein, construed the

Congressional intent regarding the Railway Labor Act, and at page 337 stated:

> "In view of the pattern of this legislation and its history, the *command of the act should be explicit and the purpose to afford a judicial remedy plain* before any obligation enforceable in the Courts should be implied. Unless that test is met, the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliances on the voluntary process of conciliation, mediation and arbitration. (Citing from Congressional Record) *The Courts should not rush in where Congress has not chosen to tread.*" (Emphasis added.)

II.

The Court Below Has Not Decided Important Questions Of Federal Law In Derogation Of The National Labor Policy.

Petitioner contends that the lower court's decision effectively eliminates the protection of the employee's rights to freely select a representative by requiring unions, such as the petitioner herein, to become "certified" as the majority representative of the craft or class of employees before the union has standing to seek a judicial remedy. The petitioner further asserts that this ruling assures that the union will be unable to come to the aid of those who have embraced it, thus undermining the employee confidence in the union and eclipsing the union's chances of becoming certified. Nothing could be further from the truth.

for although Congress has not chosen to give uncertified unions standing to invoke the protection of the Railway Labor Act, it has clearly given the employees such standing. If the employees feel that their rights are being interfered with, the Court's arms are open to embrace them and give them the protection of the Act through preliminary injunctive relief, etc. See cases cited by petitioner at page 16 of the Petition.

Both the District Court and the Circuit Court properly applied the criterion for the issuance of a preliminary injunction, as set forth by the Circuit Court (Petitioners' Appendix B, p. 14a):

> "In determining whether the District Court abused its discretion, we must consider whether the plaintiffs have shown a strong likelihood of success on the merits; whether the plaintiffs have shown irreparable injuries; whether the issuance of a preliminary injunction would cause substantial harm to others; and where the public interest lies. *North Avondale Neighborhood Ass'n* v. *Cincinnati Metropolitan Housing Authority*, 464 F.2d 486 (6th Cir. 1972)."

The failure of the plaintiffs to meet the abovementioned burden is fully set forth in the opinions of both lower courts and will not be reprinted, but reference is hereby made to those opinions as they appear in the Appendix to the Petition.

The petitioner insists that the opinion of the Circuit Court below is in derogation of the National Labor Policy, thus violates issues of strong public interest and, therefore, is erroneous; however, the public interest involved is not to assure the election of the Teamsters, or any union, the public interest, as dictated by Congress, is:

> "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise of the right of employees to join a labor organization. . . ." 45 U.S.C. §151(a)

The facts in the instant case reflect that there has been no interruption to commerce, for as set forth in the Petition at page 3, the respondent is the nation's largest air taxi carrier of freight and the second largest carrier of mail. Since the initiation of this action in April of 1975, to the date of this Brief, there has been absolutely no interruption to commerce and the respondent has been able, through the efforts of its employees, to continually expand its services to the citizens of this country.

The petitioners' insistance that the acts of the respondent complained of were in derogation of the provisions of the Railway Labor Act are further demonstrated to be unfounded by the fact that after the National Mediation Board held the election and dismissed the case for failure of the Teamsters to procure a majority from the employees, the Teamsters did not challenge the dismissal and pray for a new election, but allowed the employees' will, as demonstrated by their votes, to stand.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari to the Sixth Circuit Court of Appeals should be denied.

Respectfully submitted

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APPENDIX A

Statutes Involved

Section 151. Definitions—Short title.—When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act [49 U.S.C. § 1 et seq.], and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This Act may be cited as the "Railway Labor Act."

152. General duties.—First. Duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives. Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining—Freedom from interference by carrier—Assistance in organizing or maintaining organization by carrier forbidden—Deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other

contributions payable to labor organizations, or to collect or assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act [June 21, 1934], then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives—Time—Place—Private agreements. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the re-

ceipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [§ 156 of this title].

Eighth. Notices of manner of settlement of disputes—Posting. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives—Designation by Mediation Board—Secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations—Prosecutions and penalties. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the

duty of any district attorney of the United States [United States attorney] to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union membership a condition of employment—Check off. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally

applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership, Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, first (h) of this act [§ 153 of this title] defining the jurisdictional scope of the first division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall

provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs fourth and fifth of section 2 of this act [this section] in conflict herewith are to the extent of such conflict amended.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1278

CHARLES ADAMS, LARRY WASHINGTON, GEORGE W. ANDREWS, BILLY LOVETT, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioners*,

v.

FEDERAL EXPRESS CORPORATION, *Respondent*.

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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Petitioners, Charles Adams, Larry Washington, George W. Andrews, Billy Lovett and International Brotherhood of Teamsters, reply to the Respondent's Brief in Opposition as follows:

1. In attempting to distinguish *Texas & N.O. R.R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, from the instant case, Respondent points out that the Railroad had once recognized the Brotherhood as the representative of its employees. (Op. Cert., at 12). This scarcely obscures the fact that the Railroad sharply contested the Brotherhood's representative status and withdrew

voluntary recognition, while engaging in coercive activities against the Brotherhood's representatives similar to those alleged in the instant case. The Brotherhood, like the Union Petitioner here, was not certified as the employees' representative. Consequently the Sixth Circuit's decision in the instant case, by conditioning a union's standing on "certification," precludes judicial recourse against carrier interference by all uncertified labor organizations, regardless of whether the interference is designed to defeat representation once recognized or initially sought.

2. Respondent's bare assertion that the lower Court, applying the criteria established in *Cort* v. *Ash*, 422 U.S. 66, 78, "correctly concluded that the Railway Labor Act confers no *implied* right of action upon an uncertified union . . . " (Op. Cert., at 16) underscores the necessity for review in this case. For the issue before the Sixth Circuit was not, as in *Cort*, the preliminary question of whether a private remedy was implicit in a statute not expressly providing one. 442 U.S. at 78. See *National R.R. Passengers Corp.* v. *Passengers Ass'n*, 414 U.S. 453, 456. This threshold question was laid to rest over forty years ago, *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks, supra*; *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, as the Sixth Circuit itself reluctantly recognized. (Pet., App. B, at 11a) Thus it was necessary for the lower Court to reach the pure "standing" question of whether the Petitioner Union was among "the class of persons who may invoke the courts' decisional and remedial powers" under Section 2, Third and Fourth of the Act. See *Warth* v. *Seldin*, 422 U.S. 490, 499. This question is not determinable by reference to the *Cort* analysis.

In answering the "who" question by applying the "whether" analysis,[1] the Sixth Circuit disregarded standards previously established by this Court for determining the standing of an association to sue in its own right and on behalf of those it purports to represent. Thus the Sixth Circuit ignored the fact that the Carrier's alleged unlawful conduct adversely affected the relationship between the Union and employees, whose rights under the Act assertedly were violated. *Warth* v. *Seldin, supra*, 422 U.S. at 510; *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 237. Nor did the lower Court consider the Union's standing to represent its employee supporters, who had expressly authorized it to represent them "in all negotiations of wages, hours and working conditions in accordance with the Railway Labor Act" (JA 420), and who would have been directly benefited by grant of the injunctive relief sought. 422 U.S. at 515; *National Motor Freight Ass'n* v. *United States*, 372 U.S. 246.

Of equal importance was the lower Court's failure to consider the Union's standing to contest the Car-

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[1] Cf. *Piper* v. *Chris-Craft Indus., Inc.*, 45 U.S.L.W. 4182, 4196-97 n.4 (Stevens, J., dissenting). In *Chris-Craft*, the majority held that § 14(e) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78n(e), did not impliedly create a cause of action for damages in favor of an unsuccessful tender offeror in a contest for control of a corporation. In this Court's view, tender offerors were not intended beneficiaries of the legislation, inasmuch as it was designed to bring their previously unregulated conduct under Federal control. The Court declined to state whether a damage action would be available to shareholders (*id.* at 4192 n.25), and further declined to reach the question "whether as a general proposition a suit in equity for injunctive relief, as distinguished from an action for damages, would lie in favor of a tender offeror under either § 14(e) or Rule 10b-6." *Id.* at 4194 n.33. Thus the question of whether civil enforcement of any kind was available to anyone under § 14(e) was left unanswered by the Court.

rier's alleged interference with its organizational activities which necessarily were carried on in large measure by its employee supporters Their organizational activities, plainly protected by Section 2, Third and Fourth, cannot be separated from the Union's organizational drive because a union can act only through those persons who adhere to it. *Allee* v. *Medrano*, 416 U.S. 802, 819 n.13. In this sense, therefore, the Union activities frustrated by the Carrier's alleged misconduct are the very activities the Act was designed to protect. *NAACP* v. *Button*, 371 U.S. 415, 428. Finally the Sixth Circuit gave no consideration to whether denial of the Union's "standing" claim under Section 2, Third and Fourth, "would . . . be tantamount to a denial of private relief." *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432.

Accordingly, Respondent's assertion that the Court below applied the *Cort* analysis correctly, while doubtful at best, is beside the point. For the source of the Sixth Circuit's error lay in its reliance on inappropriate criteria to the exclusion of factors this Court has held must be considered in determining "standing" issues. These factors, had they been considered and properly evaluated, would have led the lower Courts to a different result. Unless reviewed by this Court, therefore, the Sixth Circuit's decision in the instant case will have a far-reaching, detrimental impact on the Federal law of "standing" and on labor relations in the rail and air industries. Particularly since this Court has so recently articulated the principles of "standing" in detail, the Sixth Circuit's disregard of these principles in favor of an inappropriate application of the *Cort* analysis should not be permitted to stand.

3. Respondent's reliance on *General Committee* v. *Missouri-Kansas-Texas R.R.*, 320 U.S. 323, is misplaced. In that case, the issue was whether the District Court was empowered by the statute to adjudicate the competing jurisdictional claims of two unions, each of which represented different crafts. The work in dispute involved emergency engineer service. This Court held that the District Court was without power to resolve the controversy, since jurisdictional disputes were not among the problems Congress placed "in the adjudicatory channel." *Id.* at 337. On the other hand, this Court made clear that the specific statutory commands and prohibitions contained in Section 2, Third and Fourth are "enforceable by judicial decree." *Id.* at 330-31.

4. The suggestion by Respondent (Op. Cert., at 18) that both lower Courts correctly applied the standards for injunctive relief set forth in *North Avondale Neighborhood Ass'n* v. *Cincinnati Metropolitan Housing Authority*, 464 F.2d 486 (C.A. 6), misses the point. The issue raised by the Petition is not the factual question of whether the individual Petitioners met the stringent criteria established by the lower Courts for preliminary relief. Rather Petitioners maintain that the criteria themselves are inappropriate in suits for enforcement of the Railway Labor Act, since such actions involve "a matter of public concern." *Virginian Ry.* v. *System Federation No. 40, supra*, 300 U.S. at 552. The Sixth Circuit's failure to apply the standards for preliminary relief it has announced in public interest cases (*State of Ohio ex rel. Brown* v. *Callaway*, 497 F.2d 1235 (C.A. 6)), together with its adoption of especially stringent standards, tends to render employee organizational rights "illusory." (Pet., App. B, at 15a)

5. Respondent alleges that the Union's failure to challenge the results of the National Mediation Board referendum conducted among the Mechanics and Related Employees craft or class constitutes a concession that the Carrier did not engage in pre-election conduct which was violative of the Act. (Op. Cert., at 19) The pertinence of this argument, not to mention its accuracy, is highly suspect. The regulations promulgated by the Mediation Board pursuant to Section 2, Ninth do not establish a procedure for protesting the outcome of a representation election. See 29 C.F.R. § 1206.1-8. Indeed, since Respondent's employees are unrepresented by any organization, a new representation proceeding may be initiated at any time (29 C.F.R. § 1206.4(b) ("Note")), without the need for setting aside the old election. Moreover, it has long been recognized that new elections are inadequate to redress massive employer pre-representation election misconduct. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575.

WHEREFORE, certiorari should be granted as prayed.

Respectfully submitted,

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